VIRGINIA LAW REGISTER

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Chasing the Chasers.

The Ambulance chaser's activities have been very much lessened by the Employers' Liability Acts and similar legislation. That no method of suppressing these shysters is too severe cannot be questioned and it is therefore with much pleasure that we note from a recently decided Texas case that Texas has successfully squelched them. In the case of McCloskey *v.* Tobin, Sheriff, etc., the Supreme Court of the United States has recently decided that a statute of that Commonwealth which made it a criminal offense for any person by personal solicitation to seek employment to prosecute or collect claims for personal injuries was not in violation of the 14th Amendment, although the State may have made causes of action in tort, as well as in contract assignable.

Justice Brandeis delivered the opinion of the Court, which was unanimous. McCloskey was convicted of soliciting employment to collect two claims, one for personal injuries, one for painting a buggy. He applied for a writ of habeas corpus, which was refused by two State Courts. He claimed the Act under which he was convicted, violated rights guaranteed under the 14th Amendment. His main—in fact his only—defense was that since the State had made causes of action in tort as well as in contract assignable they had become an article of commerce; that the business of obtaining adjustment of claims is not inherently evil and that therefore, whilst regulation was permissible, prohibition of the business violates rights of liberty and property, and denies equal protection of the laws.

This contention is answered very briefly and forcibly.

"To prohibit solicitation is to regulate the business, not to prohibit it. The evil against which the regulation is directed

is one from which the English law has long sought to protect the community through proceedings for barratry and champerty," says the learned justice.

"Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession to which it is necessarily related is obviously reasonable." No one can doubt the wisdom of this conclusion. We wish that every State in the Union would adopt a similar law.

Treaties the Supreme Law of the Land. The Migratory Bird Act.

With the Woman Suffrage Amendment—now almost adopted—and the Prohibition Amendment now in full force, if not virtually, the man who talks about State's Rights must be either a senile fossil or a poor old dreamer of dreams. We are both, and honestly confess it, and as a proof of the fact we are going to comment upon the last nail driven in the coffin in which those rights are buried beyond the hope of resurrection.

We allude to the decision of the Supreme Court of the United States in Missouri *v.* Holland, State Game Warden, etc., decided in April.

It will be remembered that an Act of Congress attempting to regulate the killing of migratory birds within the States and upon which we commented several times in the REGISTER was held bad in the District Court in two cases—U. S. *v.* Shauver, 214 Fed. 154 and U. S. *v.* McCullagh, 221 Fed. 288. We predicted these decisions and were glad when they were decided, though entirely in sympathy with the purposes of the Act, as in deed we are in every attempt to save the birds from the hands of pot-hunters and sportsmen. But as a celebrated physician said about vivisection, "One human life saved by the experiments made upon animals is worth more than the life of a thousand brutes." And so we humbly submit, the rights of the States are far superior to all the birds that ever flew.

The decision is of far-reaching importance. It settles

clearly, emphatically and without question that when a treaty is entered into between the United States and a foreign power and is a valid treaty that all laws passed to carry it into effect are the "Supreme Law."

Our fathers thought that in the 10th Amendment they had amply protected the States from encroachment, but the Court holds that the making of treaties is expressly delegated and that when made along with the Constitution and laws of the United States made in pursuance thereof they are the Supreme law of the land. There can therefore be no such thing as an unconstitutional treaty and a law passed to carry out the terms of a treaty being Supreme governs the States.

Therefore when any State, we say before these halcyon days when strong drink is no longer raging, had passed a law prohibiting the sale and importation of ardent spirits in its confines and this Government and France had entered into a treaty by which the importation and sale of champagne was permitted freely throughout the borders of the Union and Congress had passed an Act making it punishable with fine and imprisonment to prohibit the sale of champagne anywhere in the Union, this would be a valid law. The Supreme Court has discovered and boldly asserts that this government has "a power which must belong to and somewhere reside in every civilized government." This being the case, what need of the 10th Amendment, or for all the checks and balances our fathers so carefully placed in the Constitution to prevent this very assumption of "hidden power." Hidden powers were reserved to the States—not granted to the General Government. The Court says:

> "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago. The treaty in question does not

contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment. We must consider what this country has become in deciding what that amendment has reserved.

The state, as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds,—an assertion that is embodied in statute. No doubt it is true that, as between a state and its inhabitants, the state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, to-morrow may be in another state, and in a week a thousand miles away. If we are to be accurate, we cannot put the case of the state upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that, but for the treaty, the state would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the states, and as many of them deal with matters which, in the silence of such laws, the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties, of course, 'are as binding within the territorial limits of the states as they are effective throughout the dominion of the United States.' Baldwin *v.* Franks, 120 U. S. 678, 683, 30 L. ed. 766, 767, 7 Sup. Ct. Rep. 656, 763. No doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as Hopkirk *v.* Bell, 3 Cranch, 454, 2 L. ed. 497, with regard to statutes of limitation, and even earlier, as to confiscation, in Ware *v.* Hylton, 3 Dall. 199, 1 L. ed. 568. It was assumed by Chief Justice Marshall with regard to the escheat of land to the state in Chirac *v.* Chirac, 2 Wheat. 259, 275, 4 L. ed. 234, 238; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628; Geofroy *v.* Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; Blythe *v.* Hinckley, 180 U. S. 333, 340, 45 L. ed. 557, 561, 21 Sup. Ct. Rep.

390. So, as to a limited jurisdiction of foreign consuls within a state. Wildenhus's Case (Mali *v.* Keeper of Common Jail), 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383. See Re Ross, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. Cary *v.* South Dakota, 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403."

J. J. Vandevanter and Pitney dissent but render no opinions.

The sting in the opinion of the Court is strongest in its tail. The Court sees nothing in the Constitution that compels the government to sit by whilst a food supply is cut off and the protectors of our forests and of our crops are destroyed. We hail this with delight and trust that the Court will see nothing in the Constitution to prevent the Congress passing a law to forbid strikes by which our food supply is cut off and our crops destroyed. And there are many other things that threaten alike our well-being—our prosperity or very life. Will the Court find for these that hidden power which belongs to and somewhere resides in every civilized government? It does not seem to have been invoked when millions of dollars of property recognized and taxed as such by both Federal and State Governments were confiscated without compensation to the owners as was done by the prohibition laws.

Nor is the Court entirely disingenuous in saying "It is not sufficient to rely upon the States." State after State had passed laws aimed at protecting wild game. But what of that.

Can the Congress pass any law it chooses because "it is not sufficient to rely upon the States?"

But why argue? We shall note this case in Harry Tucker's "Treaty Making Power" and tenderly place that volume on the shelf with "The Federalist"—"Calhoun's Works" and Hayne's wonderful reply to Webster, and remain that antiquated fossil, a citizen of Virginia, forced into citizenship of the United States by the 14th Amendment and loyal to the the present without ever forgetting to be loyal to the past.

Some of the Idiosyncrasies of Legislation.

An Act of the General Assembly approved March 13th, 1918, (Acts 1918, p. 300), provided amongst other things relating to the fees of certain officers (and by the way this Act is not indexed under the title of "Fees") that "where an officer makes a levy and then a settlement is made with the officer or any other person, the officer shall receive same commissions as if receiving payment in money or selling goods." This Act amends Section 3508 of the Code of 1904. The section relating to these fees in the Code of 1919 is Section 3487, but in this section the language above quoted is omitted and the only fees the officer receives in case of a settlement is $3.00.

By an Act approved March 25th, 1920 (Acts 1920, p. 708), Section 3487 is amended and certain fees increased, and the commission included in a forthcoming bond is increased to ten per cent on the first one hundred dollars, five per cent on the next four hundred dollars and two per cent on the residue. Nothing is said, however, as to the Sheriff's commission in case of a settlement and he is allowed only $3.00 in case of a levy without a sale.

By an Act approved March 25th, 1920, Acts 1920, p. 841 (which also is *not* indexed under the head of "Fees" or "Officers"), section 3488 of the Code of 1919 is amended and the following language added: "In any case where such officer makes a levy and by reason of a settlement between the parties to the claim or suit the officer is not permitted to sell un-

der such levy, he shall nevertheless be entitled to recover from the party for whom the services were performed, one-half the commissions for such levy."

It is apparent that this language ought to have been added as an amendment to Section 3487, where it would have been naturally looked for and the profession must note with much care hereafter, that if an officer makes a levy and a settlement is made between the parties, then the plaintiff will have to pay the one-half commission, for he is the party for whom the services were performed. It will be wise therefore for lawyers to remember that after a levy is made no settlement should be made between the parties, unless there is some agreement as to the payment of the Sheriff's commission. That the Sheriff ought to have his commission in case of a levy, we have always believed was absolutely just and proper and we were in entire sympathy with the Act approved March 13th, 1918, and we still think that ought to be the law. It will then be seen that in the space of two years there have been four changes in the law, i. e., the Act of March 13th, 1918; the Code of 1919; the Act of March 25th, 1920 and a second Act approved same date. The first Act of March 25th, 1920, was an emergency act. No lawyer knew of it for months after its publication and we wonder how many illegal commissions were collected before it became known. It is very probable, however, that the Act of March 13th, 1918, was not generally known. We know of one case in which the parties acted under the section in the Code of 1904 and only retained $3.00 for the Sheriff. Counsel for the Sheriff discovering the Act of March 13th, 1918, claimed full commission and the plaintiff's lawyer felt himself obliged to pay it out of his own pocket; upon "hearing his moan," we called his attention to Section 3508 of the Code of 1919, which he had not read, not having received the Code at that time, and he was of course duly grateful. Is not there a little too much amendment nowadays and are amendments often justified except to fit peculiar cases?

The thing that surprises us very much, very often, in this world is other peoples' surprise. And a thing that has puzzled us very much is the surprise a great many people evinced at the decisions of the Supreme Court of the United States in the Stock Dividend and Prohibition cases.

The Stock Dividend and Prohibition Decisions.

That the Court could have decided the Stock Dividend case in any other manner than the way it did, it is impossible to see in view of the repeated decisions that a stock dividend was a division really of capital.

"A 'stock dividend,'" says Mr. Justice Pitney in delivering the opinion of the Court in *Eisner* v. *McComber,* decided last March by the Supreme Court of the United States, "shows that the Company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital and is no longer available for actual distribution. The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment.

"Being concerned only with the true character and effect of such a dividend when lawfully made, we lay aside the question whether in a particular case a stock dividend may be authorized by the local law governing the corporation, or whether the capitalization of profits may be the result of cor-

rect judgment and proper business policy on the part of its management, and due regard for the interests of the stockholders. And we are considering the taxability of *bona fide* stock dividends only."

To Virgina lawyers the decision should in no way come as a surprise in view of the decision of our own Supreme Court of Appeals in *Gordon's Ex's* v. *R. F. & P. R. R.,* 78 Va. 501 and *Kaufman* v. *Charlottesville Woolen Mills,* 93 Va. 676 in which our Court followed the Supreme Court of the United States which years ago adopted the Massachusetts Rule. For there are three well defined rules in the settlement of the question as to whom a stock dividend belongs. Two of these involve an arbitrary rule of distribution, the third equitable adjustment. Cook, Corp. 7th Ed., secs. 552-558.

These three rules are known as the English, the Massachusetts and Pennsylvania Rule.

As Justice Brandeis says in his dissenting opinion:

"1. The so-called English rule, declared in 1799, by Brander *v.* Brander, 4 Ves. Jr. 800, 31 Eng. Reprint, 414, that a dividend representing profits, whether in cash, stock, or other property, belongs to the life tenant if it was a regular or ordinary dividend, and belongs to the remainderman if it was an extraordinary dividend.

2. The so-called Massachusetts rule, declared in 1868 by Minot *v.* Paine, 99 Mass. 101, 96 Am. Dec. 705, that a dividend representing profits, whether regular, ordinary, or extraordinary, if in cash, belongs to the life tenant, and if in stock, belongs to the remainderman.

3. The so-called Pennsylvania rule, declared in 1857 by Earp's Appeal, 28 Pa. 368, that where a stock dividend is paid, the court shall inquire into the circumstances under which the fund had been earned and accumulated out of which the dividend, whether a regular, an ordinary, or an extraordinary one, was paid. If it finds that the stock dividend was paid out of profits earned since the decedent's death, the stock dividend belongs to the life tenant; if the court finds that the stock dividend was paid from capital or from profits earned before the decedent's death, the stock dividend belongs to the remainderman."

The Supreme Court of the United States in *Gibbons* v. *Mahon,* 136 U. S. 549, adopted the Massachusetts rule and in

Towne v. *Eisner,* 245 U. S. 418, held that a stock dividend was not income.

In view of these two cases it would have been a surprising thing if the Court had decided the instant case in any other way than it did.

It may not be uninteresting to note a few of the cases in which the validity of stock dividends have been recognized. They are Connecticut (Terry *v.* Eagle Lock Company, 47 Conn. 141; Stamford Trust Company *v.* Yale & Towne Manufacturing Company, 83 Conn. 43); Illinois (Farwell *v.* The Great Telegraph Company, 165 Ill. 522); New Jersey (General Investment Company *v.* Bethlehem Steel Corporation, 100 Atlantic 347); Pennsylvania (Dock *v.* Schlichter Jute Cordage Company, 167 Pa. State 370); Rhode Island (Parker *v.* Mason, 88 R. I. 527); Texas (Cole *v.* Adams, 19 Tex. Civ. App. 507); Virginia (Gordon's Exr's *v.* Richmond F. & P. R. Co., 78 Va. 501); Washington (Northern Bank and Trust Company *v.* Day, 83 Wash. 296).

In New York, the Court says in the case of *Williams* v. *Western Union Tel. Co.,* 93 N. Y. 162, "No harm is done to any person provided the dividend is not the mere inflation of the stock of the Company with no corresponding values to answer to the stock distributed."

It may surprise many of us to know that in Massachusetts, telegraph, telephone, gas, electric light, steam railroads, street railways, aqueduct and water companies are prohibited by statute from issuing stock dividends and New Hampshire imposes a penalty for participation in the declaration of a stock dividend. *Grafton Co. Elec. Light & Power Co.* v. *State,* 77 N. H. 539.

JJ. Brandeis, Holmes and Day dissented, the former delivering a very long and able opinion, but by no means convincing.

J. Day concurs in the dissenting opinion of J. Holmes which actually consists of only 240 words, the most surprising thing, to us, in the whole case.

We had intended to comment on the decision of the Court in what we have called the Prohibition cases, decisions which

did not surprise us in the least, but not having anything but newspaper reports at present we will wait until we have the official report before us.

Use of Evidence Wrongfully Obtained.

The liberty of the individual from unlawful arrest—from unlawful search and seizure—has become so precarious in these days when prohibition has been erected into a higher law and the methods of enforcing it superior to Magna Charta or the Bill of Rights, that it is very refreshing to come across a decision of the highest Court in the land which goes back to first principles. In the case of *Silverthorne Lumber Company* v. *U. S.*, the Supreme Court of the United States has decided that the knowledge gained by the Federal government's own wrong in seizing papers in violation of the owner's constitutional protection against unlawful searches and seizures, cannot be used by the government in a criminal prosecution by serving subpoenas to such owners to produce the original papers, which it had returned after copies had been made, and by obtaining a Court order commanding compliance with such subpoenas.

A more outrageous case of misuse of power can hardly be imagined. An indictment upon a single specific charge having been brought against the two Silverthornes mentioned, they both were arrested at their homes early in the morning of February 25, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States marshal, without a shadow of authority, went to the office of their company and made a clean sweep of all the books, papers, and documents found there. All the employees were taken or directed to go to the office of the district attorney of the United States, to which also the books, etc., were taken at once. An application was made as soon as might be to the district court for a return of what thus had been taken unlawfully. It was opposed by the district attorney so far as he had found evidence against the plaintiffs in error, and it was stated that the evidence so obtained was before the grand jury. Color had been given by

the district attorney to the approacn of those concerned in the act by an invalid subpoena for certain documents relating to the charge in the indictment then on file. Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the government planned or at all events ratified the whole performance. Photographs and copies of material papers were made and a new indictment was framed, based upon the knowledge thus obtained. The district court ordered a return of the originals, but impounded the photographs and copies. Subpoenas to produce the originals then were served, and on the refusal of the plaintiffs in error to produce them the court made an order that the subpoenas should be complied with, although it had found that all the papers had been seized in violation of the parties' constitutional rights.

The parties refused to obey this order and were held to be in contempt and appealed from the order of the Court so holding them.

The supreme Court reverses the lower court—the Chief Justice and Pitney J. dissenting.

It seems to us that to have sustained the lower court would have violated every principle of law so dear to the Anglo-Saxon race. To have allowed the Government to take advantage of its own wrong and use evidence obtained by unlawful means, would have relegated us to the days of the Inquisition and Star Chamber.

We conclude our amendments to the Code as passed by the last Legislature, with this number.

Amendments to the Code.

Page 640, amending page 604, requiring the State Board of Education to divide the State into school divisions and appoint division superintendents.

Page 795, amending section 158 of the Code of Virginia, in regard to duties of electoral boards.

Page 798, amending section 3487, concerning fees of sheriffs, etc. We have alluded to this act in an editorial in the present number.

Page 800, amending section 3484, in relation to the fees of the clerks of circuit courts and other courts.

Page 804, amending section 3481 and 3507, in regard to fees of justices of the peace.

Page 805, amending section 3468, as to judges of the city courts of cities of the first class.

Page 817, an act amending section 2158 in regard to security to be given by banks. We think this act ought to be entitled "An Act for the Benefit of Surety Companies," as it is now obligatory upon every bank to give a surety company on its bond to secure money on deposit for the Commonwealth. Heretofore the banks have given personal security and we are yet to know of a case in which there was any loss. Why this additional tax for the benefit of surety companies should be put upon banks, is beyond our ken.

Page 818, amending sections 4099, 4100, 4105, 4110, 4111, 4113, 4115, 4120, 4122, 4123 and 4129, in regard to State banks.

Page 826, amending section 4928, in relation to compensation and mileage of jurors in criminal cases.

Page 828, amending section 3292, regulating the taking of clams.

Page 831, amending sections 3184, 3187, 3188 and 3254, prohibiting non-residents from catching fish for oil or manure.

Page 834, amending section 4204, in regard to the minimum capital stock of companies, surplus, etc.

Page 836, amending sections 2224 and 2230, in regard to compensation of examiner of records.

Page 840, amending section 1810, as to work of children under age of sixteen years.

Page 841, amending section 3488, in regard to fees of officers for returns on executions, etc. We have alluded to this section also in an editorial in this number.

Page 841, amending section 4211, as to insurance companies depositing bonds with the treasurer, etc.

This concludes the amendments to the Code passed by the General Assembly of 1920. The necessity of some of these amendments is perfectly apparent. As to the others it is very hard to see any reason affecting the general good.